CASE NO.: 12-15889
CONSOLIDATED WITH: 12-15705, 12-15957, 12-15996, 12-16010, 12-16038

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: ONLINE DVD RENTAL ANTITRUST LITIGATION

ANDREA RESNICK; et al.,

Plaintiffs-Appellees,

v.

***JON M. ZIMMERMAN*,**

Objector-Appellant,

v.

NETFLIX, INC.; et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

OBJECTOR-APPELLANT ZIMMERMAN'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The District Court from which this appeal is taken had subject-matter jurisdiction over the claims herein because they predominantly related to antitrust allegations pursuant to the Clayton Act and the Sherman Act. *See* 15 U.S.C. § 26; 28 U.S.C. §§ 1331, 1337.

The Court of Appeals has jurisdiction over this matter because it is an appeal of the District Court's orders awarding attorneys' fees to Class Counsel and final judgment approving a class action settlement. 28 U.S.C. § 1291.

This appeal is timely pursuant to Federal Rules of Appellate Procedure 4(a)(1)(A) because the District Court's final decisions were both entered March 29, 2012 [ER 36–57] and the Notice of Appeal of the same was filed April 17, 2012 [ER 1]—within 30 days of entry of the orders.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

First Issue:

Did the District Court abuse its discretion by approving a class action settlement where the consideration to class members chiefly consisted of gift cards and no economic analysis of the actual value of the gift cards was offered or considered?

Reviewability and Standard of Review for First Issue (Circuit Rule 28-2.5.):

This issue was raised by Objector-Appellants' objections to class settlement [ER 203–204], and the overruling thereof by the District Court [ER 36, *et seq.*; District Court Document Number ("Doc. No.") 609]. The generally applicable standard of review regarding approval of class action settlements is abuse of discretion. *See*, *e.g.*, *Molski v. Gleich*., 318 F.3d 937, 953 (9th Cir. 2003). However, "[i]t is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo.*, 513 U.S. 298, 333 (1995) (O'Connor, J., concurring). Similarly, an abuse of discretion will be found when the record contains no evidence to support the underlying decision. *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991).

Second Issue:

Did the District Court abuse its discretion in approving a class action settlement that provided for fluid recovery to class members by a claimant fund sharing method wherein 3.4 percent of class members submitted claims?

Reviewability and Standard of Review for Second Issue (Circuit Rule 28-2.5.):

This issue was raised by Objector-Appellants' objections to class settlement [ER 201–202], and the overuling thereof by the District Court [ER 36, *et seq.*; Doc. No. 609]. The generally applicable standard of review regarding approval of class action settlements is abuse of discretion. *See*, *e.g.*, *Molski v. Gleich.*, 318 F.3d 937, 953 (9th Cir. 2003). However, "[i]t is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo.*, 513 U.S. 298, 333 (1995) (O'Connor, J., concurring). Similarly, an abuse of discretion will be found when the record contains no evidence to support the underlying decision. *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991).

III. STATEMENT OF THE CASE

Netflix and Wal-Mart entered into an anti-competitive market-splitting agreement wherein Wal-Mart would be given the DVD sales market and Netflix would be given the online DVD rental market and the two companies would not compete with each other. This action is a consolidated class action on behalf of the customers of Netflix and Wal-Mart who were forced to pay higher prices because the two companies were not competing with each other. Netflix and Wal-Mart are both defendants in the action, but Wal-Mart is the only settling defendant here, as summary judgment was granted in favor of Netflix in November 22, 2011 [Doc. No. 542], which is presently on appeal before this Court, Docket Number 11-18034.

The parties initially sought preliminary approval of a class action settlement in this matter in 2010, which was denied without prejudice by the District Court. [Doc. No. 348.] The parties moved again for preliminary approval which motion was heard August 24, 2011 [ER]. The motion was granted by order of the District Court September 2, 2011 [Doc No. 492.]

Objector Zimmerman timely submitted his objections and supporting documentation to the District Court and counsel of record on February 14, 2012. [ER 183, *et seq*.; ER 209, *et seq*.] The District Court conducted the final approval hearing on March 14, 2012 [ER 58, *et seq*.], and the District Court issued an order

of final approval and judgment March 29, 2012. [ER 36, *et seq.*; Doc. No. 609.] The District Court also issued an order awarding Class Counsel attorneys' fees that same date. [ER 55, *et seq.*; Doc. No. 607.] Objector Zimmerman timely appealed from both orders on April 17, 2012. [ER 1, *et seq.*; Doc. No. 612.]

IV. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

Defendant Netflix is the "category killer" for online DVD rentals. With 2011 revenues of over $3 billion and a current subscriber base estimated at over 24 million paying customers, Netflix is large. Netflix is so large that it essentially has been able to eliminate any competition. While streaming movies online is a much more significant portion of Netflix's business now and moving forward Netflix was able to create its market position in the online streaming space by being the only name in online DVD rental—where Netflix's own corporate documents admit that it has no competition whatsoever.[1]

Netflix was able to get to reach its monopoly status by, in no small part, entering into a market division agreement with a company that has over 100 times the revenue of Netflix: Wal-Mart. Wal-Mart had the capability to take a major bite of online DVD rental market by undercutting Netflix's pricing and throwing its

[1] Netflix January 25, 2012 Letter to Shareholders (available at http://files.shareholder.com/downloads/NFLX/1697729459x0x536469/7d1a24b7-c8cc-4f19-a1dd-225a335dabc4/Investor%20Letter%20Q4%202011.pdf).

billions behind marketing and library-building. Netflix at the time was charging $21.99 per month, while Wal-Mart was charging $17.36 per month for comparable service.[2]

Knowing that Wal-Mart's belated entry into the online DVD rental market was its only serious threat, Netflix hatched a scheme to give Wal-Mart essentially free money if it left the market.

Misleadingly called a "Promotion Agreement" by the parties, Wal-Mart and Netflix entered into a market division agreement whereby Wal-Mart would only sell DVDs and Netflix would only rent DVDs. In an unsuccessful attempt to satisfy their lawyers, Wal-Mart and Netflix added superfluous language to the final written agreement about how the agreement did not explicitly forbid the parties from crossing into each other's market territory. Contemporaneous statements by those involved made it clear that market division was the purpose of the agreement.

B. THE PROPOSED SETTLEMENT

In the Settlement Agreement filed with the Court on July 15, 2011, Wal-Mart agreed to fund a single settlement in the amount of $27,250,000. That single fund is intended to cover any payment to class members, as well as Class Counsel's attorneys' fees, class representative incentive awards, Class Counsel's

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[2] Netflix reduced its prices to $17.99 in response to competition at the time, but then raised its rates as high as $27.98 for the 3U plan.

costs, and all costs related to the notice of the settlement and administration of the settlement fund (Doc. No. 454-1; ¶¶ 6.1.1., 6.1.2 & 7.6).

After attorneys' fees, class representative's share, and all costs are deducted, the remainder will be used to pay the class membership. The payment to each class member is to be determined on a per capita basis by dividing the remainder of the fund by the number of claims received. Class members must submit a claim form in order to receive their per capita share. While class members are allowed to select whether their payment will be in the form of a "cash payment" or "gift card," those class members selecting cash are penalized by being required to submit requests for cash by postal mail only (compared to online submission for gift cards) and provide the last four digits of their Social Security number on the claim form.

Importantly, the settlement agreement provides no set amount or per capita share per class member because it requires class members to file claims (which are themselves subject to challenges and auditing) before being considered for any recovery. Based on Class Counsel's filings in this case, Netflix has provided a class membership roll of 35.3 million subscribers. After deductions for Class Counsel's fees ($6,812,500), purported costs ($1,700,000), and incentive awards ($80,000), and before accounting for notice costs, the total remaining for class claims and claim administration is $18,657,500. On an actual class member basis,

divided among 35.3 million class members, that amounts to approximately 53 cents per member—well below costs of administration.

The exceptionally low potential value of class members' claims has been roundly criticized by Netflix customers.[3]

C. NOTICE OF SETTLEMENT

Attached to the settlement agreement approved by the District Court, the parties included a specimen email notice at Exhibit 1 [Doc. No. 454]. The notice included reference to the domain name OnlineDVDclass.com and indicated that it was sent from "Online DVD Class Action Administrator." When the District Court issued preliminary approval of the settlement [Doc. No. 492], it likewise approved the same specimen notice, which was attached to the Declaration of Shannon R. Wheatman, Ph.D. on Revised Notice Plan [Doc. No. 484, Attachment #1).

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[3] Time, *Why Walmart's Netflix Settlement Is Worthless (Twice Over)* (Nov. 29, 2011) <http://techland.time.com/2011/11/29/why-walmarts-netflix-settlement-is-worthless-in-two-ways/> (accessed Feb. 14, 2012);

MSNBC, *Netflix users offered pennies by Wal-Mart to settle collusion charges* (Nov. 17, 2011) <http://redtape.msnbc.msn.com/_news/2011/11/17/8862329-netflix-users-offered-pennies-by-wal-mart-to-settle-collusion-charges> (accessed Feb. 14, 2012);

A.V. Club, *You're entitled to a meager piece of the Wal-Mart/Netflix lawsuit* (Nov. 16, 2011) <http://www.avclub.com/articles/youre-entitled-to-a-meager-piece-of-the-walmartnet,65295/> (accessed Feb. 14, 2012).

However, the actual emailed notice of settlement did not reflect the specimen in at least one important way. Sent starting on November 16, 2011, the notice did not indicate that it was from "Online DVD Class Action Administrator," it indicated that it was from "OnlineDVDclass.com." [ER 210, 212–213; Decl. Zimmerman, ¶ 4, Exhibit A.]

Subsequently, the District Court approved a revision to the class action notice on December 2, 2011 [Doc. No. 548], but provided no method to propagate the notice to class members—e.g., by sending another email. Instead, the notice documents on the website were simply updated. There was no way for class members who downloaded the notice at the time they received the email notice—two weeks prior—to know that there had been any change in the notice and that they had to go back and download the notice again in order to have the true document.

Finally, there are no *cy pres* recipients named in the settlement agreement and no plan for how to utilize any unclaimed funds to benefit the class members.

D. CLASS MEMBERS' RESPONSE TO THE SETTLEMENT

By any measure, the class membership's response to the settlement has been abysmal. Even setting aside the substantive and vigorously argued objections at the final approval hearing, and the fact that there were 722 opt-outs [ER 161; Doc. No. 585, ¶ 20], only 3.4 percent of class members submitted a claim of any kind.

[ER 161, ¶ 23 (1,176,345 timely claims recorded by the administrator). ER 179; Doc. No. 583, p. 1:10–12 ("To date, 1,176,345 timely claims have been filed through the website and through paper claims. Hodne Suppl. Decl. at ¶ 23.3. This represents approximately 3.4% of the estimated 35 million Settlement Class Members.").] Due to the structure of this settlement, which requires that class members submit a claim in order to receive anything, and which fails to provide for a *cy pres* recovery or other benefit to the class generally, the remaining 96.6 percent of the silent class membership will receive no benefit from this settlement whatsoever.

V. SUMMARY OF ARGUMENT

A. THIS IS A "COUPON SETTLEMENT"

The benefit to the class membership under this settlement largely includes gift cards, which are indistinguishable from coupons for the purposes of settlement valuation. Courts are extremely skeptical about so-called "coupon settlements" because "they often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation." *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1069 (C.D. Cal. 2010), *quoting Figueroa v. Sharper Image Corp.*, 517 F.Supp.2d 1292, 1302 (S.D. Fla. 2007).

In order to determine whether a "coupon settlement" is appropriate, the Court considers the settlement value of the rights the class members are relinquishing compared the "real monetary value and likely utilization rate of the coupons provided by the settlement." *True*, 749 F.Supp.2d at 1073, *quoting* S. Rep. No. 109-14, at 31, as reprinted in 2005 U.S.C.C.A.N. 3, 31. The parties cannot rely on the face value of the gift cards (even collectively) to determine the real monetary value because that "ignores the basic economics of coupons and rebates." *True*, 749 F.Supp.2d at 1075. ("Courts have generally rejected the idea that the face value of coupons or rebates should be used for settlement valuation purposes; '[c]ompensation in kind is worth less than cash of the same nominal value.'" *Id.*, *quoting Acosta v. Trans Union, LLC* 243 F.R.D. 377, 390 (C.D. Cal. 2007). "The Court also notes that the coupons are not only worth less than face value to class members, but they cost [Defendant] less as well." *Id.*).

B. THE CLAIMANT FUND SHARING APPROACH REQUIRES SUBSTANTIAL CLASS MEMBER PARTICIPATION

The settlement proposal here provides for a form of fluid recovery where the class members that submit proofs of claim will each get a per capita share of the settlement fund. This approach has the benefit of providing direct, individual relief to class members, but is totally inappropriate to the extent that the silent class members receive nothing and any windfall will not "further the purposes of

substantive law," but will only benefit the class members submitting approved claims. *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 475–476 (1986). "Hence, the advantages of claimant fund sharing can only be realized where a large proportion of class members participate and submit accurate claims." *Id.* at 476, *citing* Durand, *An Economic Analysis of Fluid Class Recovery Mechanisms* (1981) 34 Stan.L.Rev. 173, 178. *See also, Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) ("Such a method of computing damages in a class action has been appropriately branded as 'illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.'"). The claimant fund sharing approach is not proper here because a tiny proportion of class members—3.4 percent—participated, and because the remaining silent 96.6 percent will receive nothing.

VI. ARGUMENT

A. THE SETTLEMENT PROPONENTS FAILED TO PRESENT SUFFICIENT EVIDENCE TO WARRANT THE APPROVAL OF THE "COUPON SETTLEMENT"

Final approval for a class action settlement should only be granted where the proposed settlement is "fundamentally fair, adequate, and reasonable." *National Rural Telecoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004) (quoting 5 Moore Federal Practice, § 23.85 (Matthew Bender 3d ed.) [citing *In re*

Pacific Enters. Sec. Litig., 47 F.3d 373, 377 (9th Cir. 1995); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), cert. denied 506 U.S. 953 [113 S.Ct. 408, 121 L.Ed.2d 333] (1992)]). *See also*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) ("District courts must be skeptical of some settlement agreements put before them") (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 621 [117 S.Ct. 2231, 138 L.Ed.2d 689] (1997)).

Generally, this Court applies an eight-factor analysis to determine if the proposed settlement meets this standard. The factors are: "[1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; [8] and the reaction of the class members to the proposed settlement." *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)).

To determine whether the proposed settlement is adequate, and under the fourth *Linney* factor,[4] the District Court must have had before it sufficient

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[4] While it is generally acknowledged that "[n]ot all of [the *Linney*] factors apply to every class action settlement" (*Nat'l Rural Telecomms. Coop.*, *supra*, 221 F.R.D.

information to determine the actual value of the settlement at the time it rules on final approval. Here, because the settlement proponents failed to present any evidence of the actual value of the settlement, particularly as it relates to the Gift Card Component, and the settlement could not have been properly approved.

1. Gift Cards Are Coupons

a. The Legal Framework for Valuing Gift Cards

The central question in analyzing a class action settlement including gift cards is whether the face value of the gift cards is the actual value being provided to the class. Under both the Class Action Fairness Act (CAFA) and case law, the clear answer to that question for instruments that may be labeled "coupons" is "no." 28 U.S.C. § 1712(a) ("If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the ***value to class members*** of the coupons that are ***redeemed***.") (emphasis added); *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1075 (C.D. Cal. 2010) (using the face value of coupons to determine the aggregate settlement value "ignores the basic economics of coupons and rebates"). "Courts have generally rejected the idea that the face value of coupons or rebates should be used for settlement valuation purposes; '[c]ompensation in kind is worth less than cash of

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at 525), this counsel is not familiar with any case holding that fourth factor, "the amount offered in settlement," is not an applicable factor in any situation.

the same nominal value.'" *Id*., *quoting Acosta v. Trans Union, LLC* 243 F.R.D. 377, 390 (C.D. Cal. 2007). "The Court also notes that the coupons are not only worth less than face value to class members, but they cost [Defendant] less as well." *Id*.

Case law, as cited by Class Counsel in their reply brief in support of final approval of the class action settlement [ER 178, *et seq*. (excerpts); Doc. No. 583], is in accord that gift cards have an approximate 20 percent discount from face value for cash equivalent:

> In *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 U.S. Dist. LEXIS 81077 (N.D. Cal. Oct. 25, 2006), Chief Judge Walker evaluated a proposed class action settlement where current and former employees of the Polo retail stores had sued Polo over its policy of forcing employees to buy and wear Polo clothing for work. The settlement fund made available to class members was $400,000 in cash, and Polo gift cards with a nominal value of $500,000. … [T]he court used "anecdotal" evidence of the resale value of the vouchers to conclude their economic value was 80-85% of their face value. *Id*. at *14-15.
>
> In *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM, 2008 WL 8150856 (C.D. Cal. July 21, 2008),

> Judge Morrow evaluated a settlement that provided 100% gift cards for Victoria Secret stores to a class of former job applicants who did one-day job "tryouts" without pay. The court reduced the "actual value" of the settlement to 85% of the gift cards' face amount. … Judge Morrow concluded that "Although the argument is somewhat speculative, the court finds it persuasive" and, when valuing the settlement's benefit to the class, found that the gift cards were worth 85% of their face value. *Id*.

[ER 181–182; Doc. No. 583, Class Counsel's Reply in Support of Final Approval (hereinafter, "Reply"), pp. 8:8–9:3.]

Class Counsel's analysis of these cases claims that the trial court in each one reduced the value of the settlement because of the purported desirability of the relief to the particular class membership, and concludes that this case has greater evidence of the desirability of the gift cards because some class members chose them over cash.[5] The unsupportable nature of this comment notwithstanding (which is addressed below), Class Counsel did not offer an economic analysis of

[5] Per the declaration of the claims administrator filed below [ER 161–162], 63 percent of class members who submitted proper claims chose gift cards while 37 percent chose cash. *See also*, Reply [ER 180; Doc. No. 583, p. 2:1–3].

the value of the gift card relief here, which would have shown that these gift cards are likewise subject to a minimum of a 20 percent discount, and likely much more.

b. The Economic Framework for Valuing Gift Cards

Economic analyses of the valuation of gift cards are available and strikingly consistent. "[A] fair estimate would be that gift cards have a cash value 20 percent lower than their face value to recipients." Jennifer Pate Offenberg, *Markets: Gift Cards*, Journal of Economic Perspectives, Spring 2007, Vol. 22, No. 2 at 227, 233. As a general matter, cash value of gift cards can be estimated by reviewing resale values in the secondary market. *Id*. at 232. Variables in value of gift cards also include the stored value of the card and where the card can be redeemed. *Id*.

In the Offenberg study, out of a survey of over 2,000 gift card resale transactions, Wal-Mart gift cards proved to be resilient to significant degradation, but only at high values. *See*, *id*. at Appendix, Table A1, Summary Statistics for Gift Card Auctions (219 sales of Wal-Mart gift cards observed, with an average face value of $154.99, were subject to an average discount rate of 12.62 percent) (generally, discount rates in the Offenberg study vary from 25.47 percent to 10.83 percent). The discount rate would trend to the average of 20 percent or higher for the low-value gift cards provided for in the settlement (less than one-tenth the face value of the average gift cards in the study). Today's discount rates are no doubt different, but no less readily determinable.

In addition to the lower inherent value of gift cards compared to cash, gift cards have a lower value to the class membership in the aggregate due to the consumer behavioral phenomena of "breakage" and "upspending." Gift card "breakage" is "the industry's term for card value that was bought but never redeemed." Stephen J. Dubner & Steven D. Levitt, *Freakonomics: The Gift-Card Economy*, The New York Times Magazine (Jan. 7, 2007).[6, 7] Dubner & Levitt note statistics from Consumer Reports indicating that 19 percent of gift cards are never

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[6] Available at http://www.nytimes.com/2007/01/07/magazine/07wwln_freak.t.html (last visited Aug. 22, 2012).

[7] The concept of "breakage" for gift cards is identical to the concept of redemption rates for coupons. *See*, *e.g.*, *True*, 749 F.Supp.2d at 1074, 1075. In *True*, the court denied final approval of class action settlement in part because the expert witness offered as a proponent of the settlement failed to provide a supportable basis for determination of coupon redemption rates:

> Applying these baseless figures, Dreze [Class Counsel's expert] concluded that 7% of the total class will take advantage of Option A, and an additional 6% of the total class will take advantage of Option B. The Court is extremely skeptical of this outcome, particularly in light of the experience in other cases where less than 2% of the class redeemed similar rebates. *See*, *e.g.*, *White v. Gen. Motors Corp.*, 835 So. 2d 892, 896-97 (La. Ct. App. 2002) (less than 1.7% of class redeemed coupons); [citation to documents] (settlement report from *Gray v. Ford Motor Co.*, Sacramento Co. Sup. Ct. Case No. 03AS0391, June 26, 2009) (approximately .0075% of class redeemed coupons).

Id. Having failed to offer any redemption rate analysis here, Class Counsel offers even less than the failed settlement proponents in *True*.

used, and retailers account for unused gift cards as earnings—$16 million for the 2005 reporting year in the case of Best Buy. *Id*.[8]

Dubner & Levitt also raise the issue of "upspending." "Then there's what retailers call 'upspending': ***most customers who do use their gift cards spend some of their own money to buy merchandise that is more expensive than the value of the card***." *Id*. (emphasis added). Accordingly, as a practical economic reality, gift cards, like coupons, "promote sales without lower the price to everyone (that is, holding a 'sale')." *True*, *supra*, 749 F.Supp.2d at 1075 (quoting *Menasha Corp. v. News Am. Mktg. In-Store, Inc*., 354 F.3d 661, 662 (7th Cir. 2004)). Thus, in addition to the initial degradation of value due to the non-cash nature of the settlement, the breakage and upspending factors require additional discounting of gift card face values.

Accordingly, in terms of an economic analytic framework, there are accepted, peer-reviewed methods for arriving at discount rates for gift cards that are relatively easy to perform. Class Counsel failed to provide any such analysis in support of the settlement here. The fact that gift cards have an actual value to consumers—and therefore the class membership—which is lower than the face

[8] The breakage issue is particularly disturbing in terms of settlement value because the settlement makes no provision for a *cy pres* award or other method of handling settlement funds that go unused. Any amount not distributed either directly to class members or otherwise for the benefit of the class cannot legitimately be used to calculate the value of this settlement.

value and that Class Counsel failed to present evidence of the actual value in support of the settlement is a fatal deficiency. The matter is even more severe when considering that the particular gift cards proposed here had additional restrictions, such as only being valid for online purchases and being non-transferable. All of these conditions impact the value of the relief.

The District Court was required to determine the actual value of the settlement but failed to do so. Under *Linney*, approval of the settlement without knowledge of its value is an abuse of discretion and reversible error. *E.g.*, *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991) ("We see no evidence … upon which the district court could have rationally based its decision, and we therefore conclude that it committed a clear error of judgment … ."). The District Court's final judgment approving settlement is therefore properly overturned.

2. Coupon Settlements Cannot Be Valued at Face Value, But Require Additional Evidence to Determine the Value

In order to approve a coupon settlement, the trial court must determine the "real monetary value and likely utilization rate of the coupons provided by the settlement." *True*, 749 F.Supp.2d at 1073 (quoting S. Rep. No. 109-14, at 31, as reprinted in 2005 U.S.C.C.A.N. 3, 31).

This uncontroversial concept has been highlighted by many courts in many contexts:

> [T]he court has been presented with no evidence whatsoever as to what [settlement coupon] redemption rates might actually be. Because redemption rates have a direct and potentially devastating impact on the actual value received by the class, such lack of evidence prevents any reasoned assessment of the settlement's actual value to the class.

The fact that these coupons are redeemable along with all other discounts does factor positively into the value of these coupons. But they are still coupons and therefore cannot be legitimately taken at face value. *See Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 390 (C.D. Cal. 2007). "[C]ompensation in kind is worth less than cash of the same nominal value." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001). "Since rebates and coupons aim to facilitate a sale to a purchaser who would not otherwise purchase a product at a higher price, the Court cannot … assume that every sale to a class member 'would have happened anyway.'" *True*, 749 F. Supp. 2d at 1075. Class members may redeem their coupons with the issuing defendants "only 'because they fe[el] beholden to use the certificates,' not because they would have otherwise.

> *Id*. (quoting *In re GMC,* 55 F.3d at 808 [*In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig*., 55 F.3d 768 (3d Cir. 1995)]). In this way "coupons serve as a form of advertising for the defendants, and their effect can be offset (in whole or in part) by raising prices during the period before the coupons expire." *In re Mexico Money*, 267 F.3d at 748.

Sobel v. Hertz Corp., No. 3:06-CV-00545-LRH-RAM, 2011 U.S. Dist. LEXIS 68984, at *36–37 (D. Nev. June 27, 2011) (noting, "For the foregoing reasons, the court concludes that there is no basis upon which the court might find that this settlement produces 'real value' for the class, as Class Counsel has urged. On this sparse record, the settlement appears to have real value only for Class Counsel, the Class Representatives, the claims administrators, and the Defendants." *Id*. at *41. "Here, the parties have provided no evidence that would allow this court to make any reasoned assessment of the actual value of the settlement to the class members or of the value of the claims to be surrendered. Such lack of evidence is alone grounds for denying final approval, as the court is simply unable to fulfill its duty to the settlement class under Rule 23 and CAFA." *Id*. at *32–33.)

3. The "*True*" Value of this Settlement is Significantly Less Than the Stated Value

Coupon settlements "often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation." *True*, 749 F.Supp.2d at 1069 (quoting *Figueroa v. Sharper Image Corp*., 517 F.Supp.2d 1292, 1302 (S.D. Fla. 2007)).

At a minimum, the value of the coupon settlement here should have been discounted for the inherent lesser value compared to cash. *See* Offenberg, *supra*. Then the value should have been discounted further for the "breakage" and "upspending" phenomena. Additional factors may have also been important to determining the value, if an expert witness had been asked. The District Court erred by not asking these questions of Class Counsel and, even if it had, the settlement proponents failed to present any evidence to answer these questions. Therefore, "the court [was] simply unable to fulfill its duty to the settlement class" (*Sobel*, *supra*, at *33) and abused its discretion in approving the settlement.

4. The Inclusion of a Discouraged "Choice" of Cash for Class Member Claimants Does Not Cure the Valuation Problem

63 percent of the class member claims are for gift cards. At a minimum, the value of that 63 percent must be analyzed in terms of a coupon settlement for an

accurate total settlement value. Moreover, the fact that 63 percent of class member claimants chose gift cards does not mean that the class valued gift cards as a cash equivalent (or better?). The cash option was actively discouraged by Class Counsel because, in order to obtain cash, the class member claimant needed to submit a paper claim form by mail ***and*** needed to provide a Social Security number. [Doc. No. 454-1; ¶ 8.2.4. ("If a Claimant prefers to receive cash instead of an Electronic Gift Card, in order to minimize fraud risks, the Claimant may only submit the Claim Form by regular mail, and must include the Claimant's social security number.").] Neither of these requirements were imposed on class members selecting the gift card option.

The terms of the settlement agreement state that these requirements were "in order to minimize fraud risks," but there is no explanation as to why the fraud risks of the cash option were greater than the fraud risks of the gift card option. And if the fraud risks of the cash option are in fact greater, that by itself speaks to the relative imbalance of the value of the two options.

Ultimately, there is no legitimate purpose for Class Counsel to impose a paper form requirements and require disclosure of a Social Security number in order for class members to get cash. These invasive and purposeless requirements must have logically had an impact on the proportion of class member claimants

that selected the cash option, but again there was no evidence or analysis before the District Court upon which it could make such a determination.

Class Counsel's strategy to discourage class members from obtaining more complete relief by cash payment is, at a minimum, suspect. If Class Counsel was truly acting in the class membership's best interest, then why did it discourage a free and fair choice? And why did it not seek cash for all class members?

Moreover, the chilling effect of the purposeless additional requirements mitigates any argument by Class Counsel that the gift cards can be considered cash equivalent. Indeed, for 37 percent of the class member claimants, the gift cards were so undesirable that they chose to undergo the time and expense of filling out a form, risking their privacy by disclosing their Social Security information, and mailing a physical form to the administrator. The labor, cost of mailing, and privacy exposure by class members are not valueless. Even by Class Counsel's own argument, that additional value to the cash component must be deducted from the value of the gift cards if they are to be equivalent. In any event, the existence of a cash "option" has no bearing on the value of the gift card option without evidence justifying the comparison. Again, Class Counsel presented no evidence and the District Court abused its discretion by determining the value of the settlement without such evidence.

5. Based on the Proper Value of this Settlement, the Attorneys' Fees Award is Excessive

The District Court's order granting attorneys' fees to Class Counsel determined the amount of fees based exclusively on a "percentage-of-recovery" method. [Doc. No. 607; ¶ 2.] Accordingly, any reduction in the valuation of the settlement necessarily includes a reduction in the valuation of attorneys' fees to Class Counsel. Any reduction in fees will benefit the class by increasing the "Gift Card Component" of the settlement fund. [Settlement Agreement, Doc. No. 454-1; ¶ 6.1.1.4. ("Any portion of the Class Settlement Amount not used for the Cash Component shall be allocated to the Gift Card Component.") (The "Gift Card Component" includes all monies paid to the class membership, whether by gift card or cash.).] However, any funds added to the Gift Card Component as a result of reductions in fees will not entitle Class Counsel to ask for a proportionate increase in fees because the over all settlement fund (the "Cash Component" plus the "Gift Card Component") will remain the same. [Settlement Agreement, Doc. No. 454-1; ¶ 6.1.]. The attorneys' fees award is properly reduced in proportion to the reduction in the valuation of the settlement fund, and such funds redistributed to the benefit of the class membership.

B. CLASS PARTICIPATION IN THE SETTLEMENT IS TOO SMALL TO JUSTIFY THE CLAIMANT FUND SHARING APPROACH

The proposed class action settlement provides for a form of fluid recovery where the class members that submit proofs of claim will each get a per capita share of the settlement fund. [Settlement Agreement, Doc. No. 454-1; p. 6.1.2.1. ("The Gift Card Amount shall be a fixed value to be determined as follows. The total Gift Card Component shall be divided by the total number of Settlement Class Members who submit valid claims.").]

Known as "claimant fund sharing," this approach, in theory, has the benefit of providing direct, individual relief to class members. However, "claimant fund sharing provides no benefits to silent class members. Further, if there is a windfall, it goes not to further the purposes of the substantive law, but to overcompensate legitimate claimants or to pay erroneous or fraudulent claims." *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 476 (1986) (hereinafter, *Levi Strauss*). "***Hence, the advantages of claimant fund sharing can only be realized where a large proportion of class members participate and submit accurate claims.***" *Id.* (citing Durand, *An Economic Analysis of Fluid Class Recovery Mechanisms* (1981) 34 Stan.L.Rev. 173, 178). In *Levi Strauss*, the California Supreme Court noted that a claimant participation rate of "between 20 and 40 percent of the class -- does not

support the … assertion that the settlement as initially approved reasonably compensated class members." *Levi Strauss*, *supra*, 41 Cal.3d at 479.

However, this is California case law. Federal courts have been even less willing to tread on such undefined ground:

> Implementing fluid recovery, also referred to as "fluid class recovery," in federal class actions is controversial. [Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 Hastings L.J. 729, 730 (1987)], at 738 & n.62. In *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), the Second Circuit held that the class-wide damage assessment utilized in fluid recovery violates due process and that reading fluid recovery into Rule 23 of the Federal Rules of Civil Procedure improperly alters substantive rights in violation of the Rules Enabling Act. The Fourth and the Ninth Circuits have relied on *Eisen* to disallow fluid recovery distribution methods in class actions. [Citing *Windham* and *Kline*, both *infra*.]

Democratic Central Comm. of the Dist. of Columbia v. The Washington Metro. Area Transit Comm'n, 84 F.3d 451, 455, n. 2 (D.C. Cir. 1996). *See also*, *Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) ("Such a method of computing damages in a class action has been appropriately branded as 'illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.'") (quoting *Eisen*, *supra*); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233–234 (9th Cir. 1974) (reversing class certification, in part on grounds that the disparate damages and claims of class members will not benefit from the use of Rule 23).

Indeed, fluid recovery principles are generally employed only were unclaimed class settlement funds remain ***after*** distribution to the benefit of the class membership. *See*, *e.g.*, *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 605, n. 5 (D.N.J. 1994) ("The district court generally has four alternative procedures for distributing unclaimed class damages or class settlement funds: 1) cy pres distribution; 2) escheat to the government; 3) reversion to the defendants; and 4) claimant fund-sharing. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307-09 (9th Cir. 1990); *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491, 495-97 (W.D. Ark. 1994).").

Contrary to the settlement proposed here, a strict application of a per capita distribution only approaches propriety when there is no proof of claim

requirement, but the funds are distributed based on existing class member information—too ***all*** class members. *See*, *e.g.,* 3 Newberg on Class Actions, § 9:62, p. 540 (2002) ("[T]he issue of determining individual claims can be avoided by the court's authorization of a class recovery distribution to class members on some per capita, average, or formula basis from available records, without the need to file individual proofs of claim."). Of course, since the true class member per capita share in this case is less than one dollar, it is no wonder that the parties sought to hamstring the membership's recovery by requiring the additional step of proof of claim.

In summary, the claimant fund sharing approach utilized by Class Counsel here is of dubious propriety. Federal courts have not clearly sanctioned this method of class fund distribution, particularly where, as here, the only class members receiving a share of the settlement are those who submit a claim. The silent class members lose out completely and the claimant class members disproportionately benefit. Since this settlement offers nothing to the class membership that did not submit claims, and since 96.6 percent of the class membership did not submit claims, this method of recovery fails to serve the purposes of a class action and should not be sanctioned.

It was an error for the District Court to approve a class action settlement that provided nothing to 96.6 percent of the class.

VII. CONCLUSION

For each of the foregoing reasons, Objector-Appellant JON M. ZIMMERMAN respectfully submits that the Court should reverse the orders of the District Court approving class action settlement and awarding attorneys' fees.

DATED: August 22, 2012

By: /s/ Joshua R. Furman
Joshua R. Furman
Attorney for Objector-Appellant
JON M. ZIMMERMAN

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6., Objector-Appellant herein identifies the following related cases currently pending before the Court:

11-18034 *Resnick, et al. v. Netflix, Inc., et al.*

12-15705 *Frank, et al. v. Netflix, Inc., et al.*

12-15957 *Resnick, et al. v. Bandas, et al.*

12-15996 *Resnick, et al. v. Cope, et al.*

12-16010 *Resnick, et al. v. Sullivan, et al.*

12-16038 *Resnick, et al. v. Cox, et al.*

12-16160 *In re: Andrea Resnick, et al. v. Netflix, Inc., et al.*

12-16183 *Resnick, et al. v. Netflix, Inc., et al.*

DATED: August 22, 2012

By: /s/ Joshua R. Furman
Joshua R. Furman
Attorney for Objector-Appellant
JON M. ZIMMERMAN

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

As to the participants in the case who are registered CM/ECF users, service will be accomplished by the appellate CM/ECF system. As to the other participants identified herein, they will be served by U.S. Mail effective this date.

DATED: August 22, 2012

By: /s/ Joshua R. Furman
Joshua R. Furman
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JON M. ZIMMERMAN